SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term 1968

Docket No. 1004

MARGARET COX, HOWARD R. MOODY, ALEX J. ROSENBERG, HUMBERTO APONTE, PAUL KERRIGAN, ANDREW COOPER, STANLEY HARRY HAMILTON, PETER WEISS and BEATRICE JONES, individually and on behalf of all other citizen-electors of the City of New York,

Petitioners,

against

HERMAN KATZ, City Clerk of the City of New York and JAMES M. POWER. THOMAS MALLEE, MAURICE J. O'ROURKE and J. J. DUBERSTEIN. Commissioner of Election, constituting the Board of Elections in the City of New York and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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—o—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays for a writ of certiorari to review a final judgment and order of the Court of Appeals of the State of New York, which affirmed an order of dismissal of the Appellate Division, First Department, of the State of New York, which in turn affirmed an order by the Supreme Court of the State of New York, County of New York.

The opinion of the Supreme Court of the State of New York, New York County, is not officially reported. The order was made and entered on August 29, 1968. A copy

is attached hereto (Appendix i). The opinion of the Appellate Division, First Department was rendered on September 19, 1968, 30 A.D. 2d 432 (Appendix ii). The opinion of the Court of Appeals affirming the lower courts was rendered on October 4, 1968, 22 N.Y. 2d 903 (Appendix iii). The remittitur and order of the Court of Appeals is dated October 4, 1968 (Appendix iv). The Court of Appeals acknowledged in an amendment to the remittitur that federal questions under the Constitution of the United States were involved and raised and considered. Said amendment is dated October 17, 1968 (Appendix v).

Jurisdiction

The order of the Court of Appeals of the State of New York was entered on October 4, 1968. On December 30, 1968 the time for filing a writ of certiorari herein was extended to and including February 1, 1969 by order of Mr. Justice Harlan. The jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. Section 1257.

Questions Presented

Where a state legislature establishes a single city-wide judicial district and provides that the judges thereof be elected from irrational electoral geographic subdivisions of said judicial district divided without any relation to volume of litigation or location of courthouse or any other aspect of the administration of justice,

1. Does such state legislation violate the voting rights of the Negro and Puerto Rican people contrary to the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, in that the electoral subdivisions with predominantly white people has substantially greater

voting power for such judges and may elect more judges than those subdivisions where Negro and Puerto Rican residents preponderate.

2. Does such state legislation in granting substantially greater voting power for such judges of certain counties of such judicial districts greater than the voting powers for such judges of the residents of other counties of such judicial district violate the one man-one vote principal and unconstitutionally discriminate against the people whose votes are thus debased.

3. Are the elections of judges under any circumstances exempted from the one man-one vote principal including the circumstances as above described.

4. Where the state statutes direct that the last date for filing independent nominating petitions for candidates for particular state judicial offices is earlier than the last date for making party nominations for such offices, so that the party candidates are chosen after the expiration of time to make independent nomination, and no primary elections are provided for, does such legislation invidiously discriminate against voters who may disapprove of the nominations made by the party leaders and unconstitutionally deprive such voters of the right and opportunity to make a knowledgeable independent nomination and to associate for such purpose, and impair their right to vote contrary to the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The Constitutional Provisions and Statutes Involved

The First, Thirteenth, Fourteenth and Fifteenth amendments of the United States Constitution.

The Constitution of the State of New York:

Article I, Section 1.

"[Rights, privileges and franchise secured.]—No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidate or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law."

Article I, Section 11.

"[Equal protection of laws; discrimination in civil rights prohibited.]—No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

Article II, Section 1.

"[Qualifications of voters.]—Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is twenty-one years of age or over and shall have been a resident of this state and of the county, or village for three months next preceding an election.

Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise unless such person is also able, except for physical disability, to read and write English."

Article VI, Section 1.

"[Unified court system for state.]—a. There shall be a unified court system for the state. The state-wide courts shall consist of the court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court and the family court, as hereinafter provided. The legislature shall establish in and for the city of New York, as part of the unified court system for the state, as a single, city-wide court of civil jurisdiction and a single, city-wide court of criminal jurisdiction, as hereinafter provided, and may upon the request of the mayor and the local legislative body of the city of New York, merge the two courts into one city-wide court of both civil and criminal jurisdiction." * * *

Article VI, Section 15.

"[New York city courts.]—a. The legislature shall by law establish a single court of city-wide civil jurisdiction and a single court of city-wide criminal jurisdiction in and for the city of New York and the legislature may, upon the request of the mayor and the local legislative body of the city of New York, merge the two courts into one city-wide court of both civil and criminal jurisdiction. The said city-wide courts shall consist of such number of judges as may be provided by law. The judges of the court of city-wide civil jurisdiction shall be residents of such city and shall be chosen for terms of ten years by the electors of the counties included within the city of New York from districts within such counties established by law." * * *

Article VI, Section 21.

"[Vacancies.] * * * c. When a vacancy shall occur, otherwise than by expiration of term, in the office of judge elected to the city-wide court of civil jurisdiction of the city of New York, it shall be filled for a full term at the next general election held not less than three months after such vacancy occurs and, until the vacancy shall be so filled, the mayor of the city of New York may fill such vacancy by an appointment which shall continue until and including the last day of December next after the election at which the vacancy shall be filled. When a vacancy shall occur, otherwise than by expiration of term on the last day of December of any year, in the office of judge appointed to the family court within the city of New York or the city-wide court of criminal jurisdiction of the city of New York, the mayor of the city of New York shall fill such vacancy by an appointment for the unexpired term."

Article VI, Section 35.

"[Abolition of certain courts.] * * * c. The legislature shall provide by law that the justices of the city court of the city of New York and the justices of the municipal court of the city of New York in office on the date such courts are abolished shall, for the remainder of the term for which each was appointed, by judges of the city-wide court of criminal jurisdiction of the city of New York established pursuant to section fifteen provided, however, that each term shall expire on the last day of the year in which it would have expired except for the provisions of this article."

New York City Civil Court (Laws 1962, Chapter 693)

"Section 102. Court established. The Civil court of the city of New York is hereby established as a single city-wide court as provided by Section 1 and 15 of Article Six; with such power and jurisdiction as are herein provided by law. The court in each county of the city shall have an official seal on which shall be engraved the arms of the state, the name of the court and the county."

"Section 2201. Justices of abolished court to be justices of this court. The justices of the city court of the city of New York and the justices of the municipal court of the city of New York in office on the date such courts are abolished shall, for the remainder of the term in which each was appointed or elected to be justices for this court."

"Section 2207. Predecessor Courts Act repealed. The city court of the city of New York and the municipal court of the city of New York are hereby abolished. The New York City Court Act and the New York City Municipal Court Code and all acts amendatory thereof are hereby repealed, and the rules of the city court of the city of New York and the municipal court of the city of New York are hereby abrogated."

An Act to Provide for the Transfer of Judges to the Civil Court of the City of New York, the Number of Judges of Said Court and the Filling of Vacancies (Law 1962, Chapter 694)

"§ 1. [Judges of civil court of city of New York]

The civil court of the city of New York shall consist of ninety-five judges, all of whom shall be residents of the city of New York. No person may be chosen as a judge of this court after the effective date of this act unless he has been admitted to practice law in this state for ten years. The judges of this court shall be elected for terms of ten years.

"§ 2. [Transfer of justices]

The justices of the city court of the city of New York and the justices of the municipal court of the city of New York in office on August thirty-first, nineteen hundred sixty-two shall, for the remainder of the term for which each was elected or appointed, be judges of the civil court of the city of New York.

"§ 3. [Vacancies other than by expiration of term]

A vacancy occurring otherwise than by the expiration of term in the office of judge of the civil court of the city of New York shall be filled by the mayor of the city of New York by an appointment

which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

"§ 4. [Vacancies by expiration of term]

Vacancies in the office of judge of the civil court of the city of New York occurring by the expiration of the term on the last day of December, nineteen hundred sixty-two of a justice elected or appointed to the city court of the city of New York or the municipal court of the city of New York, who was continued as a judge of the civil court pursuant to the provisions of subdivisions c of section thirty-five of article six of the constitution, shall be filled for a full term at the general election to be held in November, nineteen hundred sixty-two. Judges to fill such vacancies shall be chosen by the electors of the county or district from which the judge whose term expires on December thirty-first, nineteen hundred sixty-two, was elected or appointed."

Amendment to the Act to Provide for the Transfer of Judges to the Civil Court of the City of New York, the Number of Judges of Said Court and the Filling of Vacancies. (Laws 1968, Chapter 152, Section 4*)

"§ 4. [Vacancies by expiration of term.] Vacancies in the office of judge of the civil court of the city of New York occurring by the expiration of the term on the last day of December, nineteen hundred sixty-eight of a justice elected or appointed to the city court of the city of New York or the municipal court of the city of New York, who was continued as a judge of the civil court pursuant to the provisions of subdivision c of section thirty-five of article six of

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* In 1963 the language of Section 4 was changed by inserting the phrase after the word "constitution", "or of their successors" (top line next page), and there was inserted the phrase "or his predecessor." (near the end of the quotation next page) In addition, from year to year the year "1962" appearing in the text of L. 1962 C. 694 § 4 was amended to "1963," "1964," "1965," "1966," "1967" and "1968." Law 1963, Chapter 848; Law 1964, Chapter 377; Law "1967," and "1968." Law 1963, Chapter 848; Law 1964, Chapter 377; Law 1965, Chapter 190; Law 1966, Chapter 109; Law 1967, Chapter 39.

the constitution, or of their successors, shall be filled for a full term at the general election to be held in November, nineteen hundred sixty-eight. Judges to fill such vacancies shall be chosen by the electors of the county or district from which the judge whose term expires on December thirty-first, nineteen hundred sixty-eight, or his predecessor, was elected or appointed."

Additional Judges Act (Law 1968, Chapter 987**)

"§ 14. Section one of chapter six hundred ninety-four of the laws of nineteen hundred sixty-two, entitled 'An act to provide for the transfer of judges to the civil court of the city of New York, the number of judges of such court and the filling of vacancies,' as amended by chapter forty-five of the laws of nineteen hundred sixty-five, is hereby amended to read as follows:

Section 1. The civil court of the city of New York shall consist of one hundred twenty judges, all of whom shall be residents of the city of New York. No person may assume the office of judge of this court after the effective date of this act unless he has been admitted to practice law in this state for ten years. The judges of this court shall be elected for terms of ten years.

The twenty-five additional judges of the civil court of the city of New York authorized on the effective date of this act shall be elected in and from the residents of the following counties in the indicated numbers: from the county of New York, seven; from the county of Kings, seven; from the county of Queens, six; from the county of Bronx, four; and from the county of Richmond, one. Such additional judges shall receive the same compensation as the existing judges of the civil court of the city of New York."

** This statute has a title approximately 30 lines long but is generally referred to as the Additional Judges Act, enacted in May 1968 and approved on June 22, 1968.

Statement of the Case

This action was instituted on August 15, 1968 by electors of the City of New York, Negro, Puerto Rican and white, seeking a declaratory judgment and temporary and permanent injunctive relief to prevent an election of civil court judges said to be violative of the United States Constitution as well as that of the Constitution of the State of New York. Brought into issue are certain state statutes which pertain to the election of civil court judges, a public office.

The petitioners allege, upon uncontested facts, that the procedure established for the election of civil court judges of the City of New York is in violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments of the United States Constitution.* The provisions of the State Constitution, as applied, raise the same federal questions.

The petitioners contend that:

> (a) The statutes providing for the election of civil court judges invidiously discriminate, with no justification or compelling state interests, against the Negro and Puerto Rican voters of the city of New York.
>
> (b) The method of election of civil court judges, based on no rational reason, violate the principle of one man-one vote in the selection of judges.
>
> (c) The complex of election law provisions at issue effectively deprives the electors of any meaningful opportunity either to enter a primary, to make an independent nomination, or to organize an independent political party candidate for the elective office of civil court judge.

This action was instituted for interim and final relief was denied by the Court of Appeals on October 4, 1968,

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* All of the facts are alleged in the pleadings, and as to those few not so stated they are of such a nature that the Court may take judicial notice.

at a time when it was impossible under the election laws to place any independent candidate or insurgent party nominee on the ballot for the general election held November 5, 1968.

Effective September 1, 1962, Article VI, the judiciary article of the New York Constitution, was amended providing inter alia (§ 1 and § 15a) for a single New York city-wide court of civil jurisdiction. The Constitution's residence requirement is merely that the judge reside anywhere in the city of New York.

The State constitution mandates that the judges "shall be chosen for terms of 10 years by electors of the county included within the city of New York *from districts within such counties established by law*" (emphasis supplied).

Prior to the amendment of Article VI of the Constitution there were two city courts of limited jurisdiction. The municipal court had districts of varying sizes and numbers of justices within each county and courthouses in each district. The city court had county-wide districts in each of the five counties with the number of justices varying from county to county.

§ 35 of Article VI expressly abolished the then existing city court and municipal court. In 1962, a single city-wide civil court was created by statute (Laws of 1962, Chap. 693). The statute specifically abolished the city and municipal courts (§ 2201). The legislature failed to create electoral districts within each county for the election of civil court judges as was required by the Constitution in 1962.

The need to create such districts under the Constitution was acknowledged by the Governor when he signed the Civil Court Act. He stated:

> "Section 15 of the new Constitutional Amendment *requires the Legislature to establish the districts from which judges of the new court are to be elected.* Exigencies of time did not permit the

> full implementation of this provision at the 1962 session. It is expected that such legislation will be presented at the 1963 session." *McKinney,* New York Laws of 1962, p. 3655. (Emphasis supplied)

To permit the transition from the old court system to the single city wide court in 1962, and awaiting the creation of districts in 1963, Chap. 694 of the Laws of 1962 was enacted. § 4 provided that where vacancies were created by expiration of term, such vacancies in the courts to be abolished at the end of 1962 would be filled in November 1962 and that such judges would be chosen by the electors "of the County or district" from which the judge whose term expired at the end of 1962 had been elected. Evan as an interim provision its constitutionality is questionable. Any civil court judge, regardless of the place of his election, can be and is assigned to any of the civil courthouses in the several counties of the city. They usually are assigned or "allocated" on the basis of the needs of the various divisions of the court. There is no contention by the petitioners that this is improper.

By reason of jurisdictional and venue provisions, a resident of any of the counties of the city of New York may sue or be sued in any of the counties of the city, In each of the counties there is a single civil courthouse.

Thus it is clear that the only purpose of the requirement to create districts is to provide for the process of electing judges. The Constitution requires "electoral districts", not "judicial districts" in that there is only one "judicial district", the City of New York.

The Legislature did not live up to the Governor's expectations and has not to this day created the requisite electoral districts within each county. Bills were introduced but failed of passage because the political parties could not agree for partisan and other reasons. In 1963 the legislature revised § 4 of the Laws of 1962, Chap. 694, by changing the words "nineteen sixty-two" to "nineteen sixty-three", and repeated the amendments from year to

year, the section now reading "nineteen sixty-eight". In 1963 § 4 was also amended by inserting the phrase "or of their predecessors" and "or of their successors". This was an attempt to distort the very purpose of the Law of 1962, Chap. 694, which bears the following title:

> "An act to provide for the transfer of judges to the civil court of the city of New York, the number of judges of said court and the filling of vacancies."

Since no electoral districts were created for civil court judges, the respondents and the legislators have used the transition aspects of the statute as justification to use the abolished municipal court districts for the election of civil court judges. The unfortunate consequence, in violation of the federal Constitution, is the foundation of this action.

Until 1968, 68 judges had been elected from the "municipal court districts", which had been multi-office, within each county, and 27 judges on the basis of the city court "districts", multi-office and county-wide. When the Additional Judges Act came into being, on June 22, 1968, after the spring primary elections, 25 additional judges for the civil court were provided. New York county was given 7, Kings county 7, Queens county 6, Bronx 4, and Richmond 1. No provision for electoral districts within each county was made. The political leaders of the counties of New York City opted to nominate by executive committee multi-party candidates for civil court judge, and the nominations were filed on September 23, 1968. No primary election was provided for, and indeed anyone wishing to run on an independent ticket was without knowledge of who the partys' nominees were to be on September 9th, when independent petitions were required to be filed.

The Consequences of the Use of the Abolished Municipal Court Districts.

The municipal court districts until 1945 were occasionally recast and the number of judges changed. No material changes had been made in any of the municipal court districts for 22 years. Yet, in view of demographic changes since that time,* the use of these old districts to elect civil court judges has resulted in invidious discrimination against the Negro and Puerto Rican people and their right to an effective franchise.

The census data and other governmental reports referred to in the pleadings and undisputed on this record, and this Court may take judicial notice of the fact that there are large ghetto areas in the City of New York, as indeed there are ghetto areas in every major urban population center throughout the nation. In New York City both the Puerto Rican and Negro people are forced to live in ghettos—ghettos created by a multiplicity of factors, all arising out of racial and color discrimination, "a relic of slavery", a "custom of slavery", a "spectacle of slavery unwilling to die".

The Negro and Puerto Rican people are still discriminated against in housing regardless of all of the statutes on the books and the decisions of this Court. This discrimination is also reflected in employment and education. Harlem and East Harlem are known by all to be Negro and Puerto Rican ghetto areas. Bedford-Stuyvesant perhaps may be said to be the largest and most rapidly growing ghetto both in geographic area and population, approaching 500,000. It is rapidly being matched by other ghetto areas, particularly in Bronx County.

In the present record, particular detail is set forth as to the make-up of the population of New York City. Such relationship to the "municipal court districts" of New

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* We do not discuss constitutional informities in the abolished districts prior to 1962.

York county is specifically set forth. In 1960 the population of that county was 1,681,400. The Negro population was 410,300 (24.4%); the Puerto Rican population was 222,000 (13.2%) for a total of 37.6%. Attached to this petition Exhibit A sets forth the total population of New York County as of 1960 by municipal court districts, the make-up of that population and the number of judges elected from each abolished municipal court district. Exhibit B sets forth the geographic area covered by the districts.

In the Ninth District of Manhattan where the white population is 95%, the ratio to population of judges is 16,700 to 1. This district of 100,0000 elects 6 civil court judges. Yet in the Tenth District, which is approximately 95% Negro and Puerto Rican, and which in 1960 had a population of approximately 180,000, only 2 civil court judges are elected, the ratio of population to judges being 89,000 to 1.

This racial and color discrimination in the electoral process serves no purpose except to give the white elector in the Ninth District the power to elect more judges and to make each individual vote in a white district worth six times that of a contiguous Negro and Puerto Rican district. East Harlem, the Eighth District, which has approximately the same number of people as the Ninth District, 107,000, and which is 78% Puerto Rican and Negro, elects 2 civil court judges at a ratio of population to judge of 53,000 to 1. Its voting power is one third that of the Ninth District, the white district.

In the Second District which is 70.4% white, with a population of 205,000, 5 civil court judges are elected. The First District which is 87% white, having a population of 80,000, elects 3 judges. The Third District of 102,000, 80% white, elects 4 judges. The Fourth District of 112,000, 95% white, elects 3 judges.

Thus, in 5 districts overwhelmingly white, the smallest percentage being 70%, the greatest percentage being 95%,

21 civil court judges are elected at a ratio of 30,000 to 1 while in the two ghetto districts, the Eighth and Tenth, 287,000 people elect 4 civil court judges at a ratio of 70,000 to 1.

Whether the state action is premeditated or not* the facts are beyond dispute; and the effect of state action resulting in discrimination against those forced to live in ghetto areas is not denied.

All of the above, constitutes a violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution. The New York Court of Appeals construction of Article VI of the State Constitution constitutes a violation of the Federal Constitution as applied.

The petitioners do not request that the required elective districts be drawn on racial lines but solely that they be drawn in such fashion as to be compact, contiguous districts premised upon the principal of one-man, one-vote. Each civil court judge should be elected from a separate district.

The Consequences of the Use of the Abolished City Court Districts.

Using the population figures as of 1966 county by county and as a result of the Additional Judges Act, we find the following: New York County, with a population of 1,494,000 elects 50 civil court judges at a ratio of 34,000 to 1; Kings County, with a population of 2,561,000 elects 33 civil court judges at a ratio of 79,000 to 1; Bronx County with a population of 1,301,000 elects 16 civil court judges at a ratio of 88,000 to 1; Queens County with a population of 1,952,000 elects 17 judges at a ratio of 105,000 to 1; Richmond County with a population of 250,000, elects 4 judges at a ratio of 42,500 to 1.

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* It cannot credibly be contended that the legislature was unaware of these facts. Such knowledge is alleged and not disclaimed

Since any judge wherever elected may and does sit in any part of the court such disproportion in the values of votes has no rational purpose. This is directly in conflict with the principle of one-man, one vote.

As set forth in the pleadings, the Negro and Puerto Rican people in 1960, represented 22.1% of the population, in 1966 they represented 29.3% of the population. Since an overwhelming percentage of the Negro and Puerto Rican people live in ghetto areas in the various counties, permitting multi-office countywide elections their vote is diluted and based, in fact, almost entirely destroyed, save to the extent that the white majority may deign to give token representation in the judiciary.

The invidious discrimination whether wanted or not is compounded by the fact that of the 120 civil court judges, 68 are elected from the abolished municipal court districts which clearly discriminate against the Negro and Puerto Rican electors in one fashion and at the same time countywide elections debase and devalue their vote by another device.

The Denial of the Constitutional Right to A Primary and Independent Party Candidates.

In February 1968, the state legislature set up a procedure for the nomination and election of officers for the general election to be held on November 5, 1968. (Laws of 1968 Chap. 27, approved March 12, 1968)

Political leaders in the event of the absence of a primary designate their nominees to the Board of Elections by September 23, 1968. Under the state constitution a party primary is required save where there is no contest.

June 18, 1968 was designated at the same 1968 legislative session that later passed the Additional Judges

Act as the primary date for that year.* Independent nominations petitions had to be filed between September 3 and September 9, 1968. Electors were unable to determine whether to organize either a party or group to run an independent candidate for judge and obtain the requisite signatures since the party nominees were unknown to them prior to that time. As no primary was permitted by law for such nominations, party leaders used the September 23rd deadline.

This electoral structure deprived the voters of their rights under the First and Fourteenth Amendments.

The Presentation of Federal Questions.

The federal questions were raised in the pleadings and briefs in the state courts at the inception of the action and throughout the proceedings. The Fourteenth and Fifteenth amendments of the Constitution were cited. While the First and Thirteenth amendments were not referred to by name, the very nature of the pleadings and thrust of the action would encompass all four of the amendments. The state court of appeals in its amendment to the remittitur acknowledged that federal questions were raised and considered, mentioning the Fourteenth and Fifteenth Amendments.

The Relief Requested.

At the time of the institution of this action on August 15, 1968, the petitioners sought a declaratory judgment and injunctive relief declaring certain statutes as they provide for the election of Civil Court judges unconstitutional and enjoining the respondents from taking such action as would permit them to be placed on the ballot at the General Election in 1968, and thereafter until the legislature provided appropriate constitutional procedures for election of civil court judges.

Petitioners have been denied relief. The elections were held. Yet the proceeding was timely brought and petitioners are entitled to equitable relief framed to meet the present situation. Were petitioners granted certiorari, this

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* Under state law a primary may be held in the spring or fall or on both occasions.

Court would have the power to grant the declaratory judgment, and to direct that the elections held should be set aside. Further, this Court could direct that elections may not be held until the legislature enact the appropriate laws consonant with the constitutional requirements as enunciated by this Court, and that the civil court elections be held as soon thereafter as circumstances permit.

The Civil Court judges purportedly elected in November of 1968 hold office for a term of 10 years. Whether wise or not, it is the custom and usage that upon the conclusions of any term the judges are renominated by all the parties. Furthermore, many of the judges of the supreme court of New York are selected from the civil court judges for terms of 14 years. Since the judges elected in 1968 are so great in number, it would effect the makeup of the judiciary in the State of New York for at least a generation. The unconstitutionally elected judiciary sitting on the bench because of undemocratic methods, thrust upon the electorate by party leaders who had no choice cannot be permitted.

Reasons for Granting the Writ

1. The issues raised in the present petition are of great significance in that they relate to the constitutional prerequisites for the election of the judiciary. While there is no federal constitutional requirement that the states elect their judiciary, where an election is held such elections must comply with the federal constitution and particularly those of the First, Thirteenth, Fourteenth and Fifteenth amendments.

The issues raised in this petition and in the courts below must be considered in light of the fact that the minority groups subject to discrimination, Negro, Puerto Rican, and others by reason of their race, color and national origin are forced to live in overcrowded slum ghettos, whether urban or rural.

Intertwined in the present action is the fundamental prerequisite of our democracy, the right to an effective vote, see *Yick Wo* vs. *Hopkins*, 118 U.S. 356, and the right to have that full franchise utilized regardless of race, color, national origin, or previous history of personal servitude and the customs and usage associated therewith. In addition is the right to associate and organize to effect such an end.

2. Were the opinion and judgment of the lower courts to stand it would in substance be saying that even where there is no rational, let-alone compelling, purpose, invidious discrimination under the Thirteenth, Fourteenth and Fifteenth amendments in the electoral process may be permitted in the election of the judiciary. Were the opinions below permitted to stand in the absence of any rational purpose the one-man, one vote principle would not apply in the election of the judiciary. Equally, the lower court's opinion finds there is no constitutional right to a party primary even though the constitution of the state mandates the same. The decision necessarily imports there is no constitutional right of the electors to organize an independent party or run independent nominees for judicial office.

The lower court relied in part on certain decisions of federal district courts. We disagree with the implications drawn and will note the different factual and legal factors. If correctly interpreted by the lower courts then in that event there is a substantial constitutional issue which should be passed upon by this Court. Further, the decision in *Bell* vs. *Southwell,* (C.A. 5) 376 F 2d 659, is directly in conflict with the lower courts holding and its interpretation of other district court decisions. In light of these facts, the issues raised are of such a nature as to warrant the granting of the petition for a writ of certiorari.

3. This court has held prior to *Baker* v. *Carr* 369 U.S. 186 and its progeny, under the Thirteenth, Fourteenth

and Fifteenth amendments of the federal constitution that any impairment of any basic right, and specifically the right to vote, by reason of race, color, previous condition of personal servitude or ethnic background can not be constitutionally tolerated, *United States* vs. *Classic,* 313 U.S. 299; *Gomillion* v. *Lightfoot,* 364 U.S. 339; *Nixon* v. *Herndon,* 273 U.S. 536; *Nixon* v. *Condon,* 286 U.S. 63; *Smith* v. *Allwright,* 321 U.S. 649; and *Terry* v. *Adams,* 345; U.S. 461, both "sophisticated as well as simple minded modes of discrimination", *Lane* v. *Wilson,* 307 U.S. 268; *Gomillion* v. *Lightfoot, supra,* ex parte *Yarborough,* 110 U.S. 651; *U.S.* v. *Mosley,* 238 U.S. 373; see also the dissent *of Mr.* Justice Frankfurter in *Baker* v. *Carr, supra.*

If the legislature enacted a law that Negro and Puerto Rican voters could not vote for civil court judges there would be no question about its invalidity. Equally, if it were said that a Negro or Puerto Rican voter could by statute have only one sixth, one third or any less than a vote of the value of a white voter, there would not be any question of its unconstitutionality. Yet in truth, that is the issue here which the lower courts disregarded. This is the effect.

The use of the abolished municipal court districts for elective purposes in conjunction with countywide elections of some of the civil court judges has debased or essentially destroyed the right to vote, whether with intent or not, of the Negro and Puerto Rican electors. The consequence is that Negro and Puerto Rican voters in the election of the civil court judges are not to be allowed to vote under the one man one vote principle.

4. The lower courts misread or erroneously interpreted the nature of the action and its objectives. In response to the undisputed fact that the votes of the Puerto Rican and Negro people had been diluted, debased or destroyed, the Appellate Division held:

> "The asserted inability of certain minority groups to nominate or elect a judge of their own persuasion does not afford a constitutional basis of relief."

The rationale tendered was that it is not proper to create for electoral purposes districts on the basis of race, color or religion.

It is not the petitioners who ask that districts be so structured. The present electoral divisions *are* so structured. Indeed, the petitioners complain that it is discrimination that forces ghettos into being and that the people so evilly harassed then have their votes either taken away or debased by various statutes in the election of judges of the civil court. The petitioners ask that the required electoral districts be created and further that these districts be compact, contiguous and equal in population.

The suggestion of the courts below that it is the petitioners who wish to create districts on the basis of race, color or religion is not only incorrect but ignores the fact that the existence of the ghettos is a result of a history of slavery and color discrimination which impelled this nation to bring the Thirteenth, Fourteenth and Fifteenth Amendments into existence. One cannot separate the electoral process contrived by state action to elect civil court judges from the existence of the ghetto and its causes. By state and private action the whites have combined to drive Negroes out of certain communities while the whites left those areas where the Negroes and Puerto Ricans are forced to congregate and reside, thus preserving the "relic of slavery", "the badges and customs of slavery". *Jones* v. *Alfred H. Mayer & Co.*, 392 U.S. 409. The technique devised

for the election of civil court judges represents one of those "Cases which come to this Court [which] depict a spectacle of slavery unwilling to die". The process of election in this instance represents "contrivances by states designed to thwart Negro [Puerto Rican] voting."*

5. Detailed comment on the opinions of the courts below is difficult to make in that they have no relationship to the cause of action they were confronted with and the undisputed facts alleged.

It would seem from reading the opinion of the Appellate Division as if the petitioners were complaining about the allocation of judges to various areas or subdivisions of the single civil court to various courthouses. But that was not the compiaint. Nor do the petitioners complain about the fact that judges may be assigned to various counties where the court may be sitting. From reading the opinion of the Appellate Division and the cases cited with reference to the election of the judiciary two things are quite evident: none of the cases referred to related to the question of racial discrimination in the selection of judges; and the essential issue involved in each of those cases was the irrelevant question of the allocation or assignment of judges in a multi-district structure to overcome calendar delays.** Our case, on the contrary, deals with inequality in electoral "districts", all of which are in the same judicial district, no question of allocation of judges being involved.

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* In *Jones* this Court noted the interrelationship of the Thirteenth, Fourteenth and Fifteenth Amendments and that the Fourteenth Amendment was a reaffirmation of the Thirteenth brought into being to eliminate any doubts as to the constitutional validity of the Civil Rights Act of 1866.

** *New York State Association of Trial Lawyers* v. *Rockefeller*, 267 F.Supp. 148; *Kail* v. *Rockefeller*, 275 F.Supp. 937; *Buchanan* v. *Rhodes*, 249 F.Supp. 860 appeal dismissed 385 U.S. 3; *Stokes* v. *Fortson*, 234 F.Supp. 575.

6. The courts below conclude that regardless of the element of racial discrimination in the election of civil court judges the principle of one man-one vote is not applicable to the judiciary, in that a judge does not make law, only legislators do, and that judges merely apply the law in a ministerial fashion because they do not represent or champion the cause of a particular constituency.

In fact courts and judges do make law both in the federal and state courts and this is part of our common law and its tradition. Judges are not mere administrators or subject to computerization. The judgmental process is much more complex and personalized. It so happens that the civil court of the City of New York is essentially the court of the poor of whom the Negro and Puerto Rican people constitute the overwhelming majority. Yet this is the court where judges are elected primarily by whites and the Negro and Puerto Rican people are particularly deprived of effectively participating in the election. If the courts below were correct, if the mere fact that judicial elections are involved would suffice to defeat the petitioners' case, then it would be lawful and constitutional to deny all Negroes and Puerto Ricans the right to vote for judges and to have all judges elected by whites only!

7. One cannot separate the one man-one vote principle from the previously established constitutional mandate that there be no discrimination under the Thirteenth, Fourteenth and Fifteenth Amendments either under the Equal Protection Clause or the proscription of discrimination by reason of race, color, previous condition of servitude or national origin. This matter has been specifically disposed of in *Bell* v. *Southwell*, (C.A.5) 376 F. 2d 659 where there was flagrant discriminatory conduct. That case involved the election of a judge. A suit was instituted after the election. The Court of Appeals invalidated the election and noted that where there is discrimination it is not only the Negro, in that instance, "but the body politic as a

whole both Negro and White" who suffer. The court articulated the established principle, see *Yick Wo* v. *Hopkins, supra,* that the constitution requires that the court look with closest scrutiny to determine the existence of discrimination in the electoral process.

In New York and in many northern states the forms and procedures to discriminate against the Negro, Puerto Rican and other minorities are usually more subtle, complex and devious and even on occasion unintended. Yet the effect is the same and equally unconstitutional.

The right to organize an independent political party or to nominate an independent nominee is a constitutional right the deprivation of which is in violation of the First and Fourteenth Amendments of the Constitution. *Williams* v. *Rhodes,* — U.S. — 89 S.Ct. 5.

In *Williams* v. *Rhodes, supra,* this court held that where the electoral laws made it overly burdensome to nominate an independent candidate, the laws were unconstitutional. In the present action, as in *Williams* v. *Rhodes,* the state has imposed "burdens on the right to vote" and if there is any invidious distinction there is a violation of the Equal Protection Clause.

The voters of the City of New York must be afforded the right to organize and associate and "cast their votes effectively". This right has been impinged upon. As the court pointed out in *Williams* v. *Rhodes, supra,* to give a meaningful opportunity to associate and organize means one must know whom the parties will nominate since that is a vital factor in the determination to run an independent candidate. The petitioners here were deprived of that right.

The legislature knew, as shown by its amendments to the Election Law in 1968 and the Additional Judges Act in the same session that they were creating and utilizing "cumbersome election machinery" to deny a truly effective

right to independently nominate and to vote for civil court judges in the City of New York. Mr. Justice Harlan so stated in his concurring opinion in referring to cumbersome statutory schemes,

> ". . . the state has eliminated the basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights. The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of political association."

9. The fact that the elections have already been held should not deter this Court's exercise of its equitable powers to declare the statutes unconstitutional, and set aside the election.

The petitioners support the Additional Judges Act to the extent it increases the number of judges to expedite the work of the courts. Yet, if a judge is unconstitutionally elected he must not be permitted to remain if all of the electorate and particularly the Negro and Puerto Rican people were deprived of any effective choice in the selection of the judiciary by unconstitutional means.* An equitable remedy must be found now which will not permit those elected to sit for 10 years, or more likely, for 20 to 25 years, in view of the custom and usage of judicial renomination and designation to higher courts.

This action was brought in August of 1968, three months prior to the election. On October 4, 1968 the state appellate process was completed. The situation is analogous to that found in *Bell* v. *Southwell, supra,* and *Hamer* v. *Campbell,* (C.A. 5) 358 F.2d 215, cert. den. 385 U.S. 851. In *Hamer* v. *Campbell* the action was instituted prior to the election. The election was held and thereafter the Court

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* Although not in the record everyone knows that the party leaders, even overriding a judicial screening panel, made their deal and the voters had no choice.

of Appeals set aside the election and directed that a special election be held, affording adequate time, in the spring of the subsequent year. In *Bell* v. *Southwell* the action was not instituted until after the election. Yet the Court of Appeals nevertheless found that the election was unconstitutional and it directed that a new election be held under terms and conditions that would remove the unconstitutional methods long previously followed.

The statutes challenged should be declared unconstitutional. The election of all civil court judges improperly elected should be declared null and void and the respondents should be enjoined from holding an election until the legislature removes the constitutional defects and directs the holding of an election of civil court judges in conformance with the Constitution and the guidelines that this Court may set forth.

Conclusion

New York State has enacted numerous civil rights statutes. Its constitution includes many aspects of the amendments of the Federal Constitution upon which petitioners seek relief. Civil rights statutes brought into being by the federal government are applicable to the state. But as stated by this Court and by the senators who enacted the original civil rights act of 1866, statutes, amendments to the constitution, declarations of truth and principle are essentially rhetorical unless there are means and methods to resort to the courts to enforce these principles, encompassed in the constitution, statutes and statements of policy.

We know the judiciary in the states can and should be a protagonist for the enforcement of basic democratic rights of all of the citizens of each of the states. Petitioners cannot conceive how a judicial structure tainted from its incep-

tion by discrimination against the Negroes and Puerto Ricans in the election process can meet its obligations and duties.

The petition for writ of certiorari should be granted. The orders and judgments of the courts below should be reversed and the relief requested granted.

Respectfully submitted,

MILTON M. FRIEDMAN
MARSHALL PERLIN
Attorneys for Petitioners

APPENDIX i

(Order of Special Term)

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM, PART I

COUNTY OF NEW YORK

Present:

HON. JOHN L. FLYNN, *Justice.*

Index Number 12996, 1968

———o———

MARGARET COX, *et al, etc.*

against

HERMAN KATZ, *et al, etc.*

———o———

The following papers numbered 1 to 6 read on this motion argued.

No. 82 on Calendar of August 29, 1968.

	Papers Numbered
Filed Papers—Order to Show Cause—and Affidavit Annexed summons complaint	1–4
2 Cross Motion	5–6

Cox v. *Katz*—Motion is denied. It is impossible to ascertain anything herein which renders the act of the Legislature creating in 1968 a number of Civil Court judges unconstitutional. Cross-motion of Board of Elections and the city clerk is accordingly granted.

Dated: August 29, 1968

J L F

J.S.C.

APPENDIX ii

(Opinion of Appellate Division)

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT, SEPTEMBER 1968

Index No. 13618

ARON STEUER, *J.P.*
GEORGE TILZER
OWEN McGIVERN
JAMES B. M. McNALLY, *JJ.*

MARGARET COX, HOWARD R. MOODY, ALEX J. ROSENBERG, HUMBERTO APONTE, PAUL KERRIGAN, ANDREW COOPER, STANLEY HARRY HAMILTON, PETER WEISS and BEATRICE JONES, individually and on behalf of all other citizen-electors of the City of New York,

Plaintiffs-Appellants,

against

HERMAN KATZ, City Clerk of the City of New York, and JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and J. J. DUBERSTEIN, Commissioners of Election, constituting the Board of Elections in the City of New York,

Defendants-Respondents,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

Appeal from an order of the Supreme Court at Special Term (FLYNN, *J.*), entered on August 29, 1968, in New York County, which denied appellants' application for a temporary injunction and dismissed the complaint.

Appendix ii

MILTON H. FRIEDMAN and MARSHALL PERLIN, Attorneys for plaintiffs-appellants.

ROBERT E. HUGH of counsel (J. LEE RANKIN, Corporation Counsel) for defendants-respondents.

PHILIP WEINBERG of counsel (SAMUEL A. HIRSHOWITZ and GEORGE D. ZUCKERMAN with him on the brief) for intervenor-respondent.

McNALLY, J.:

Plaintiffs, electors of the City of New York, challenge as unconstitutional various statutes implementing the establishment of the city-wide court of civil jurisdiction. Defendants are the City Clerk and the Commissioner of Elections, constituting the Board of Elections in the City of New York.

The statutory provisions for the election of the judges are allegedly violative of the New York State Constitution because of non-compliance with the provision for their election "by the electors of the counties included within the city of New York from districts within such counties established by law." (Art. 6, sec. 15, subd. a.) Plaintiffs also contend that the statutory provision for the election at the general election to be held in November 1968 of 25 additional judges (L. 1961, c. 987, sec. 17) is invalid and contrary to Art. 1, sec. 1, and Art. 2, sec. 1 of the New York State Constitution securing franchise, and violative of the equal protection clause of the Fourteenth Amendment and the Fifteenth Amendment of the United States Constitution.

The New York State Constitution was amended November 7, 1961, effective September 1, 1962, to enable the Legislature to establish a single court of city-wide civil jurisdiction. Art. 6, sec. 15 provides, in part: "The judges of the court of city-wide civil jurisdiction shall be

residents of such city and shall be chosen for terms of ten years by the electors of the counties included within the city of New York from districts within such counties established by law."

Art. 6, sec. 35, subd. c of the Constitution makes provision for the abolition of the city court and the municipal court of the city of New York and the transfer of the justices thereof to the city-wide court.

In accordance with the constitutional mandate, the Legislature established the Civil Court of the City of New York (L. 1962, c. 693), abolished the municipal and city courts of the city of New York and constituted the justices thereof judges of the Civil Court (*id.*, sec. 2201; L. 1962, c. 694). Subsequent annual amendments of ch. 694 provide that a vacancy in the office of judge of the Civil Court formerly a justice of the Municipal or City Court is to be filled by the electors of the county, in the case of a former justice of the City Court, or his successor, and in the case of a former justice of the Municipal Court, or his successor, by the electors of the former Municipal Court district. The 25 additional judges provided for by L. 1968, c. 987, are allocated among the five counties of the City of New York.

Plaintiffs allege the several political parties propose to make nominations for the 25 additional judicial offices and the City Clerk is about to certify that 25 additional judges are to be elected at the general election in 1968 in contravention of the rights of the electors of the City of New York to nominate candidates for such offices.

The aforesaid statutory allocation of judges is presumptively constitutional. (*Wasmuth* v. *Allen,* 14 N.Y. 2d. 391, 397; *I.L.F.Y.Co.* v. *City Rent Administration,* 11 N.Y. 2d. 480, 490.) The establishment of the city-wide court of civil jurisdiction served to merge the former City Court and Municipal Court of the City of New York. The

justices of the merged Municipal Court had been elected from Municipal Court districts within each county, and the justices of the merged Civil Court had been elected from each of the counties within the City. It was necessary to enable the Legislature to establish judicial districts for the city-wide court in the light thereof. Patently it was not intended to compel the Legislature to discard the county basis formerly utilized for the election of justices of the City Court. (It is also evident that the constitutional provisions for the city-wide Civil Court do not purport to resolve the feasibility of extending to it the former Municipal Court districts as the basis for the election of judges of the city-wide court.)

We construe the provisions of Art. 6, sec. 15, subd. a, for the election of judges of the city-wide Civil Court to enable the Legislature to provide for their election by the electors of each of the counties within the city, and to resolve whether or not to allocate judges to districts within such county in the light of the fact that justices of the Municipal Court had been elected from districts within each county.

The Legislature has seen fit to provide for county-wide election of former City Court justices and their successors as well as the 25 additional judges, and for the election of former Municipal Court justices and their successors from the former Municipal Court districts. We may not sit in review of the discretion exercised by the Legislature or its wisdom. (*People* v. *Friedman*, 302 N.Y. 75, 79.)

The said legislative provisions for the allocation and election of judges of the city wide Civil Court do not infringe the right of franchise or the equal protection provisions of the United States and New York State Constitutions. There are many relevant factors in the allocation of judges, including population, volume and nature of litigation, location of governmental agencies and officials and transportation facilities. In contrast, the election of legis-

lators involves the constitutionally protected right of each individual to an equal, undiluted vote regardless of race, color, creed or religion. There is no constitutional requirement for allocation of judges on the sole basis of population. (*N.Y. State Ass'n of Trial Lawyers* v. *Rockefeller*, 267 F. Supp. 148; *Kail* v. *Rockefeller*, 275 F. Supp. 937.)

The asserted inability of certain minority groups to nominate or elect a judge of their own persuasion does not afford a constitutional basis for relief. Even as to legislators it has been said:

> "The principle of equality at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on ***. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Wright* v. *Rockefeller*, 376 U.S. 52, 66, Douglas, J., dissenting; *Mann* v. *Davis*, 245 F.Supp. 241, 245, *aff'd* 382 U.S. 42.

In the light of the existing circumstances, it is within the competence of the political parties of the City of New York to nominate candidates for the position of 25 additional judges. Sec. 1, Art. I of the New York State Constitution provides, "No member of this state shall be disfranchised ***." This franchise includes the right to participate in the nomination of candidates. The Legislature, however, may regulate the right within reasonable limitations. (*Matter of Davis* v. *Board of Elections*, 5 NY 2d 66, 69.

Involved are extraordinary circumstances. The Act providing for the additional 25 Civil Court judges (ch. 987, L. 1968) provides (sec. 17) it shall take effect June 1, 1968, but that the judges shall first be elected at the general election in November, 1968, and shall take office January 1, 1969. The Act was signed and became effective June 22, 1968, after the spring primary had been held.

Appendix ii

Public Officers Law, sec. 30, subd. 2, provides:

> "When a new or an additional office shall be created, such office shall for the purpose of an appointment or election, be vacant from the date of its creation, until it shall be filled by election or appointment."

Sec. 131, subd. 7 of the Election Law enables a party nomination to fill a vacancy occurring after the primary by a majority of the county committee if the office is not statewide. (*Matter of Adler*, Sup. Ct. West. Co., Dempsey, J., L.J. 8/12/68, col. 9.)

Appellants argue that ch. 987 is so framed as to preclude interim appointments by the Mayor of the City of New York to fill the newly created judicial offices. Hence, they argue, since there is no vacancy in the light of the Mayor's power to appoint, there is none with respect to the power to nominate of the county committee. The answer is that the statute creating the new judgeships mandates their election in November 1968 and precludes their taking office prior to January 1, 1969, thus precluding any interim appointment.

For the reasons above stated, the order denying appellants' application for a temporary injunction and dismissing the complaint should be affirmed, with costs.

ALL CONCUR.

APPENDIX iii

(Memoranda Opinion of Court of Appeals)

MARGARET Cox et al., Individually and on Behalf of All Other Citizen-Electors of the City of New York, Appellants, *v.* HERMAN KATZ, as City Clerk of the City of New York, et al., Respondents, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, Intervenor-Respondent.

Cox v. *Katz*, 30 A D 2d 432, affirmed.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered September 19, 1968, which unanimously affirmed an order of the Supreme Court at Special Term (JOHN L. FLYNN, J.), entered in New York County, denying an application by plaintiffs for a temporary injunction and dismissing their complaint in an action for, among other things, a judgment declaring unconstitutional various statutes implementing the establishment of the single court of city-wide civil jurisdiction provided for by article VI of the New York State Constitution, as amended effective September 1, 1962. In said constitutional amendment, provision was made for the abolition of the City Court and the Municipal Court, for the transfer of the Justices thereof to the city-wide court and for the choosing of the Judges of the city-wide court "by the electors of the counties included within the city of New York from districts within such counties established by law" (art. VI, § 15, subd. a). The Legislature thereafter established the Civil Court of the City of New York, abolished the City Court and Municipal Court, whose Justices had been elected, in the case of the Municipal Court, from Municipal Court districts within each county in the city and, in the case of the City Court, from each of the counties within the city, constituted the Justices of the City and Municipal Courts Judges of the

Appendix iii

Civil Court, and provided that a vacancy in the office of Judge of the Civil Court was to be filled, in the case of a former Justice of the Municipal Court or his successor, by the electors of the former Municipal Court district and, in the case of a former Justice of the City Court or his successor, by the electors of the county (L. 1962, ch. 693; L. 1962, ch. 694, as last amd. by L. 1968, ch. 152). In 1968, in a bill which was signed into law on June 22, 1968, after the date of the spring primary election, the Legislature created 25 additional judgeships for the Civil Court, allocated them among the five counties, and provided that these new Judges were to be elected, on a county-wide basis, at the November, 1968 general election and were to take office January 1, 1969 (L. 1968, ch. 987, §§ 14, 17). Plaintiffs alleged that article VI (§ 15, subd. a) of the New York State Constitution required the Legislature to establish Civil Court districts for the selection of the Judges of the Civil Court; that the statutory provisions for county-wide elections to said judicial offices violated the principle of "one man-one vote" and effected a disenfranchisement of electors on the basis of racial and ethnic origins, and that nominations for the additional judgeships could not constitutionally be made by party committees or in any manner other than by the electors at a primary election. The Appellate Division concluded that section 15 (subd. a) of article VI of the New York State Constitution enabled the Legislature to make provision, in its discretion, for the election and allocation of the Judges of the Civil Court; that the statutes enacted to implement said constitutional provision did not infringe the right of franchise or violate the equal protection clause of the United States Constitution, and that, in the light of the circumstances, the nominations for the additional judgeships might properly be made by the political parties rather than by the electors of the city.

Appendix iii

Milton H. Friedman and *Marshall Perlin* for appellants.

J. Lee Rankin, Corporation Counsel (*Robert E. Hugh* of counsel), for respondents.

Louis J. Lefkowitz, Attorney-General (*Philip Weinberg, Samuel A. Hirshowitz* and *George D. Zuckerman* of counsel), intervenor-respondent.

Per Curiam. We agree with the decision of the Appellate Division and concur with the views expressed in its opinion. We would simply add a few lines to point up the federal questions urged upon us by the plaintiffs.

There is no basis for the application of the "one man-one vote" principle to the present case. That doctrine, designed to assure representative government in a democracy such as ours, was never intended to regulate the election of judges whose functions are solely judicial. There is neither reason nor justification for a requirement that judges be distributed or allocated throughout a state or city on a per capita basis. Legislatures are responsible for enacting laws by which all citizens are to be governed, and, accordingly, "they should be bodies which are collectively responsive to the popular will." (See, e.g., *Reynolds* v. *Sims,* 377 U. S. 533, 565.) However, the judiciary, differing radically from the Legislature, is not responsible for achieving representative government. As one court has put it, "population is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges. The volume and nature of litigation arising in the various areas of the state bears no direct relationship to the population of those areas." (*New York State Assn. of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148, 153-154; see, also, *Kail* v. *Rockefeller,* 275 F. Supp. 937; *Buchanan* v. *Rhodes,* 249 F. Supp. 860, app. dsmd. 385 U. S. 3; *Stokes* v. *Fortson,* 234 F. Supp. 575, 577.)

The function of judges, it is manifest, is to apply the law, not to represent or champion the cause of a particular con-

stituency. More specifically, the judges of the New York City Civil Court (with which we are concerned) do not act collectively. They are not to be elected to represent a particular point of view. The Civil Court does not receive cases on the basis of the racial or ethnic origins of the parties or their places of residence within the city. Quite obviously, the Legislature is called upon to exercise a far different kind of discretion in determining how judges are to be allocated to geographical areas, and how they are to be chosen, than it exercises—or would be free to exercise—in establishing electoral districts or in prescribing methods of nomination for the election of legislators or of those vested with legislative functions.

The order appealed from should be affirmed, without costs.

Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, KEATING, BREITEL and JASON concur.

Order affirmed.

APPENDIX iv

(Order of Court of Appeals)

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 4th day of October in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

Witness.

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

———o———

1. No. 465, 68

MARGARET COX, & ors., &c.,
Appellants,

vs.

HERMAN KATZ, City Clerk of the City of New York, & ors., &c.,
Respondents.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Intervenor-Respondent.

———o———

BE IT REMEMBERED, That on the 21st day of September in the year of our Lord one thousand nine hundred and sixty-eight, Margaret Cox, & ors., &c., the appellants in this

cause, came here unto the Court of Appeals, by Freedman & Perlin, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Herman Katz, City Clerk of the City of New York, & ors., &c., the respondents, and Louis J. Lefkowitz. Attorney General of the State of New York, the intervenor-respondent in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, and Louis J. Lefkowitz, Attorney General, pro se, attorneys. Which said Notice of Appeal and the return thereto, filed as aforsaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Messrs. Milton H. Friedman and Marshall Perlin, of counsel for the appellants, and by Mr. Robert E. Hugh, of counsel for the respondents, and by Mr. Philip Weinberg, of counsel for the intervenor-respondent-, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and pro-

vided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the the Court of Appeals of the State of New York

COURT OF APPEALS, CLERK'S OFFICE
Albany, October 4, 1968

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

APPENDIX v

(Order of Court of Appeals)

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventeenth day of October, A. D. 1968.

Present:

HON. STANLEY H. FULD,
Chief Judge, presiding.

---

1 Mo. No. 1100

MARGARET COX, & ors., &c.,

Appellants,

vs.

HERMAN KATZ, City Clerk of the City of New York, & ors., &c.,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York.

Intervenor-Respondent.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellants contended that they were denied equal protection under the law contrary to the one man-one vote principle, contrary to the Fourteenth Amendment of the Constitution of the United States and, further, that the Negro and Puerto Rican voters were, by said action, discriminated against by reason of their race, color and national origin and thus their right to effective franchise was diluted or destroyed contrary to the Fourteenth and Fifteenth Amendments of the Constitution. The Court of Appeals, considered these contentions and held that there was no violation of appellants' constitutional rights.

AND the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEORGE KIMBALL,
Deputy Clerk.

EXHIBIT A

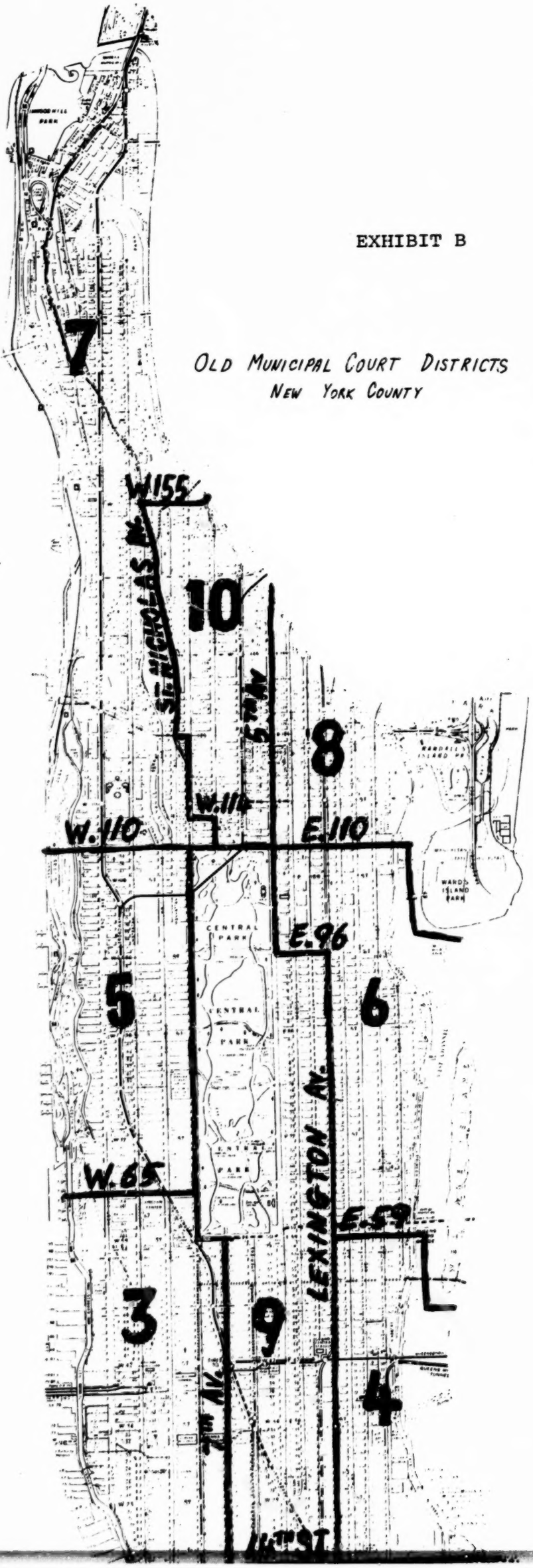
(PHOTOSTAT)

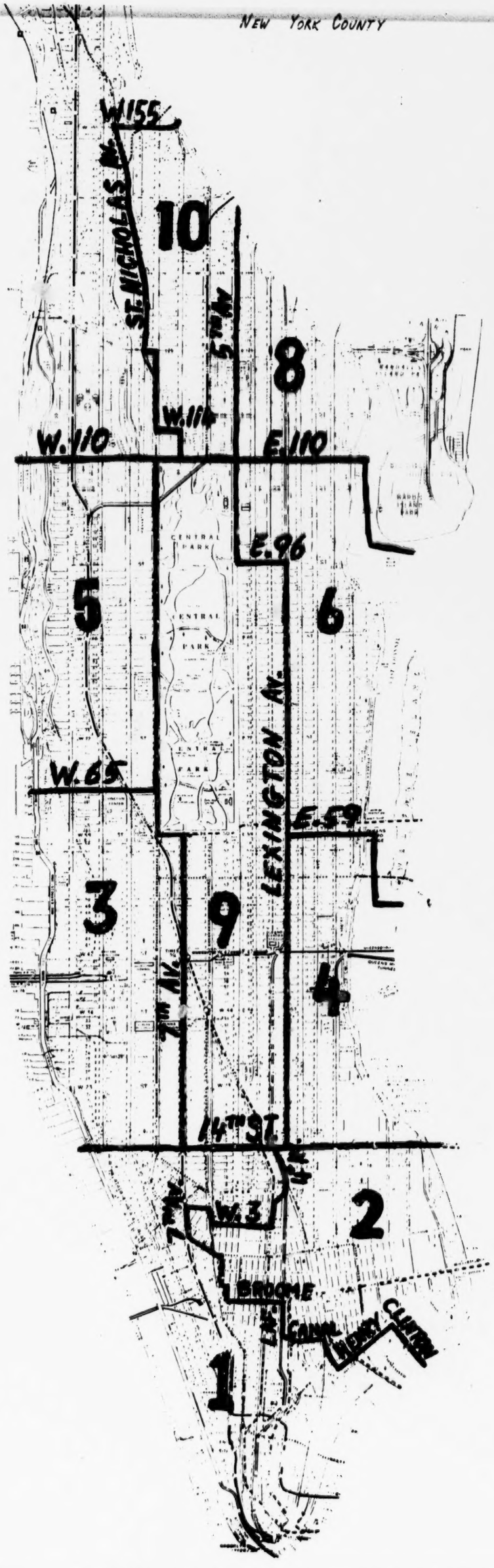
(See Opposite ☛)

Old Municipal District	Total Population	Number of Judges	Ratio Population To Judge	White	(%)	Negro	(%)	Puerto Rican	(%)
1	79,743	3	26,581	69,667	87.4	4,512	5.7	5,564	7.0
2	205,318	5	41,064	144,555	70.4	14,526	7.1	46,237	22.6
3	102,369	4	25,592	80,387	78.5	5,430	5.3	16,552	16.2
4	111,749	3	37,249	105,280	94.2	1,430	1.28	5,039	4.5
5	246,631	3	82,213	181,560	73.6	27,207	11.0	37,864	15.4
6	197,905	3	65,968	146,183	73.9	13,937	7.0	37,785	19.1
7	350,433	3	116,811	215,439	61.5	103,824	29.6	31,170	8.9
8	107,191	2	53,595	23,554	22.0	48,504	45.3	35,133	32.8
9	100,170	6	16,695	94,724	94.6	1,851	1.8	3,595	3.6
10	179,887	2	89,943	10,161	5.7	165,341	91.9	4,385	2.4

EXHIBIT B

OLD MUNICIPAL COURT DISTRICTS
NEW YORK COUNTY

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7 AV.
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SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
FEB 28 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

DOCKET No. 1004

MARGARET COX, HOWARD R. MOODY, ALEX J. ROSENBERG, HUMBERTO APONTE, PAUL KERRIGAN, ANDREW COOPER, STANLEY HARRY HAMILTON, PETER WEISS and BEATRICE JONES, individually and on behalf of all other citizen-electors of the City of New York,

Petitioners,

against

HERMAN KATZ, City Clerk of the City of New York and JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and J. J. DUBERSTEIN, Commissioner of Election, constituting the Board of Elections in the City of New York and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENT ATTORNEY GENERAL IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 1004

MARGARET COX, HOWARD R. MOODY, ALEX J. ROSENBERG, HUMBERTO APONTE, PAUL KERRIGAN, ANDREW COOPER, STANLEY HARRY HAMILTON, PETER WEISS and BEATRICE JONES, individually and on behalf of all other citizen-electors of the City of New York,

Petitioners,

against

HERMAN KATZ, City Clerk of the City of New York and JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and J. J. DUBERSTEIN, Commissioner of Election, constituting the Board of Elections in the City of New York and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENT ATTORNEY GENERAL IN OPPOSITION TO CERTIORARI

Statement

Petitioners seek certiorari to the Court of Appeals of the State of New York. That Court unanimously affirmed an order of the the Appellate Division of the Supreme Court, First Judicial Department, which in turn unanimously affirmed an order of Supreme Court, New York County, denying petitioners' motion for a temporary injunction and dismissing their complaint.

The action sought to restrain the holding of the 1968 general election of Civil Court judges of the City of New York at which 25 newly-created positions were filled, as well as several vacancies. The election was held November 5, 1968 and the new judges took office January 1, 1969.

Reported below: 30 A. D. 2d 432; 22 N. Y. 2d 903.

Prior Proceedings

In 1961 the Civil Court of the City of New York was established, replacing the former City and Municipal Courts (N. Y. Constitution Art. VI § 1[a]). Judges of the Civil Court are to be chosen "by the electors of the counties included within the City of New York from districts within such counties established by law" (Art. VI § 15[a]). Existing judges of the City and Municipal Courts were made judges of the Civil Court for the remainder of their terms "and for such district as the legislature may determine" (Art. VI § 35[c]).

The Legislature, in pursuance of this mandate, provided that vacancies resulting from expiration of terms at the end of 1962 be filled "'by the electors of the county or district from which the judge whose term expires * * * was elected or appointed'" (L. 1962, ch. 694, § 4). This method of filling vacancies has been reenacted each year to date (L. 1968, ch. 152, § 4).

By Laws 1968, ch. 987, the New York State Legislature created 25 additional judgeships for the Civil Court of the City of New York, a court with civil jurisdiction in cases involving less than $10,000 (New York Const. Art. VI § 15[b]), to be elected at the 1968 general election by the voters of the respective counties to which such positions were assigned—7 each from New York and Kings Counties, 6 from Queens, 4 from Bronx and 1 from Richmond (L. 1968, ch. 987, § 14).

Petitioners brought this action to restrain the election of such 25 judges, alleging:

(1) Counties are not "districts" within the meaning of the provision of the State Constitution that judges of the Civil Court be chosen "by the electors of the counties included within the City of New York from districts within such counties established by law" (Art. VI § 15[a]);

(2) The failure of the additional judges act (L. 1968, ch. 987) to provide for a primary election for the nomination of Civil Court judges violated the State Constitution (Art. I § 1);

(3) The allocation of such judges to counties and their election county-wide violated the "one-man-one-vote" doctrine and discriminated against Negro and Puerto Rican voters; and that

(4) The provisions for filling vacancies on the Civil Court caused by the expiration of term of former Municipal Court justices by the electors of the Municipal Court district from which the incumbent had been elected (L. 1968, ch. 152) violated the "one-man-one-vote" doctrine and discriminated against Negro and Puerto Rican voters.

The first two of these causes involved pure issues of State law and petitioners conceded as much in their complaint, which made not the slightest reference to the United States Constitution in either of those causes of action (Complaint ¶1-37; pp. 39-40). The other two causes referred to the Fourteenth and Fifteenth Amendments only, as well as the State Constitution (Complaint ¶46, 54, 69; p. 40).

The Supreme Court, New York County, denied the temporary injunction sought by petitioners and dismissed the complaint (1a). Affirming, the Appellate Division of the Supreme Court, First Department, upheld the "statutory allocation of judges [as] presumptively constitutional"

(4a) and held these provisions "do not infringe the right of franchise or the equal protection provisions" because (5a-6a):

> "There are many relevant factors in the allocation of judges, including population, volume and nature of litigation, location of governmental agencies and officials and transportation facilities.
>
> * * *
>
> There is no constitutional requirement for allocation of judges on the sole basis of population. (*N. Y. State Association of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148; *Kail* v. *Rockefeller,* 275 F. Supp. 937.)"

The Court added that "[t]he asserted inability of certain minority groups to nominate or elect a judge of their own persuasion does not afford a constitutional basis for relief" (6a), citing the language of Mr. Justice DOUGLAS' dissent in *Wright* v. *Rockefeller,* 376 U. S. 52, 66 (1964):

> "The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on * * *. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense."

Petitioners' other contentions were similarly rejected. The Court of Appeals, unanimously affirming, concurred in the Appellate Division opinion and added "a few lines to point up the federal questions urged upon us by the plaintiffs" (10a-11a):

> "There is no basis for the application of the 'one-man-one-vote' principle to the present case. That doctrine, designed to assure representative govern-

> ment in a democracy such as ours, was never intended to regulate the election of judges whose functions are solely judicial. There is neither reason nor justification for a requirement that judges be distributed or allocated throughout a state or city on a per capita basis. * * * The function of judges, it is manifest, is to apply the law, not to represent or champion the cause of a particular constituency."

Thereafter, on petitioners' motion, the Court of Appeals amended its remittitur to state that petitioners "contended that they were denied equal protection under the law contrary to the Fourteenth Amendment of the Constitution of the United States, and, further, that the Negro and Puerto Rican voters were, by said action, discriminated against by reason of their race, color and national origin and thus their right to effective franchise was diluted or destroyed contrary to the Fourteenth and Fifteenth Amendments" (16a). This was the precise language proffered by petitioners in their motion to amend the remittitur. Significant is the utter absence of any reference to the First or Thirteenth Amendments, relied on now for the first time by petitioners.

The election was held November 5, 1968 and the judges elected took office January 1, 1969 and are presently serving.

ARGUMENT

No substantial constitutional question worthy of consideration by this Court is raised by petitioners. The attempt to extend the *Reynolds* v. *Sims* holding to void last year's election of judges of the Civil Court of the City of New York is utterly without merit.

A.

The present petition seeks in large part to transmute into claims under the United States Constitution matters

of state law which were litigated as such in the state courts. The fourth "question presented" by petitioners (Pet. p. 3) deals with the fact that the statutes do not provide for a primary, as to which no federal claim was ever asserted below. It is far too late in the day for them to contend for the first time here that the failure to include a primary for the nomination of Civil Court judges impaired their right of association and right to vote contrary to the First and Fourteenth Amendments (Pet. p. 3). *Ellis* v. *Dixon,* 349 U. S. 458 (1955), reh. den. 350 U. S. 855; *Head* v. *New Mexico Board of Examiners,* 374 U. S. 424, 433 n. 12 (1963).

Likewise, reference to the First and Thirteenth Amendments by petitioners in their attempt to enlarge the "one-man-one-vote" principle and have it mandate precise uniformity of districts used for the election of judges is no more than an afterthought, barred by their conceded failure to invoke those provisions below (see Pet. p. 18).

Moreover, as we shall show, none of these claims, whether relied on below or voiced here for the first time, raises any such substantial issue under the Constitution as would justify review by this Court, especially where the relief sought amounts to the overturning of the election of more than 25 presently sitting judges—the new seats as well as several vacancies which were filled at the 1968 elections.

B.

Analysis of petitioners' claims shows that none assert the deprivation of any federally-protected right of petitioners. Their claim of "discrimination" against Negro and Puerto Rican voters does not withstand analysis. The 25 additional judges were elected county-wide as provided by the statute (L. 1968, ch. 987), which dovetails with the division of the Civil Court into counties for purposes of

venue and location of courthouses (See Civil Court Act §§ 102, 301; Civil Ct. Rule 1).*

The Legislature's determination to have 7 of the 25 new judges elected each from New York and Kings counties, 6 from Queens, 4 from Bronx and one from Richmond was an administrative distribution, not subject to challenge here.** These judges' "function is to administer the law, not to espouse the cause of a particular constituency." *Stokes* v. *Fortson,* 234 F. Supp. 575, 577 (N. D. Ga. 1964), which rejected a similar claim.

The fact is that every attempt since the legislative apportionment cases (*Baker* v. *Carr,* 369 U. S. 186 [1962];

---

* Civil Ct. Act § 102 in part provides:

"The court in each county of the city shall have an official seal * * *."

Section 301 provides for venue by county. And Civil Ct. Rule 1 in part states:

"(a) Divisions of the court shall be designated as follows:

The Civil Court of the City of New York, County of Bronx
The Civil Court of the City of New York, County of Kings
The Civil Court of the City of New York, County of New York
The Civil Court of the City of New York, County of Queens
The Civil Court of the City of New York, County of Richmond."

** This distribution represents an appropriate balance between the populations of the five counties and amount of litigation in the Civil Court in each, as shown:

	Number of Additional Judges	*Intake of Actions for year July 1, 1966-June 30, 1967*	*Population (1966)*
New York Co.	7	55,166	1,494,000
Kings Co.	7	35,379	2,561,000
Queens Co.	6	22,901	1,952,000
Bronx Co.	4	20,136	1,301,000
Richmond Co.	1	1,499	250,000

Source: Report of the Judicial Conference of the State of N. Y. (1968), pp. A136-A137.

Reynolds v. *Sims,* 377 U. S. 533 [1964]) to stretch their holding to cover the selection of judges has been rejected by the federal courts. See *N. Y. State Assn. of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148 (S.D.N.Y. 1967); *Kail* v. *Rockefeller,* 275 F. Supp. 937 (E.D.N.Y. 1967); *Stokes* v. *Fortson, supra; Buchanan* v. *Rhodes,* 249 F. Supp. 860 (N. D. Ohio 1966), app. dism. 385 U. S. 3. The shoe simply does not fit. As District Judge TENNEY held in the *Trial Lawyers'* case (267 F. Supp. at 152):

> "In asking this Court to undertake the responsibility for ordering a judicial reapportionment of New York State judges, plaintiffs attempt to rely upon the recent legislative reapportionment cases (par. 25). Such reliance is totally without merit as should be obvious from a reading of the apportionment opinions.
>
> The reapportionment cases (*Reynolds* v. *Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 and companion cases decided on June 15, 1964) were concerned with the composition of state legislatures as 'the fountainhead of representative government in this country' and the recognition that 'Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.' * * *
>
> The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis."

Indeed, there is of course no constitutional requirement that Civil Court judges be elected at all. Judges of the Criminal Court and Family Court of the City of New York, for example, are appointed by the Mayor (see N. Y. Const. Art. VI §§ 13[a], 15[a]). And legislation providing for mayoral appointment of Civil Court judges as well is

presently being given serious consideration. See N. Y. Times, Feb. 24, 1969, page 72.

The allegations of "invidious discrimination" against Negroes and Puerto Ricans are, in the context of this case, insupportable. Obviously no ethnic group has a vested interest in any public office. There is, and could be, no claim here that any New York City voter has been prevented from casting his ballot for any Civil Court judge because of his race or national origin. Petitioners' assertion amounts to the absolutely insupportable claim that unless Negroes and Puerto Ricans constitute a majority in a district from which a judge is to be elected, they cannot hope to elect one of their number to the bench.

This argument is an affront to the judiciary and the electorate as well. "The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on." *Wright* v. *Rockefeller,* 376 U. S. 52, 66 (1964) (DOUGLAS, J. dissenting). See, to the same effect, *Mann* v. *Davis,* 245 F. Supp. 241, 245 (E. D. Va. 1965), aff'd *sub. nom. Burnette* v. *Davis,* 382 U. S. 42:

> "The concept of 'one person, one vote' we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color."

See too *Sincock* v. *Gately,* 262 F. Supp. 739 (D. C. Del. 1967); *Kilgarlin* v. *Martin,* 252 F. Supp. 404 (S. D. Tex. 1966), rev'd on other gds. *sub. nom. Kilgarlin* v. *Hill,* 386 U. S. 999; *Jones* v. *Falcey,* 48 N. J. 25, 222 A. 2d 101 (1966) (dismissing a claim that if the City of "Newark were constituted a single district, the political power of Negro voters in that district would be decisive and hence the al-

location of the city's wards within two districts dilutes their maximum political impact," and finding "no proof that the Legislature intended to advantage or disadvantage any racial or ethnic group" [p. 106]).

The cases relied on by petitioners dealt with far different facts and are of no assistance to them here. *Bell* v. *Southwell* (Pet. p. 20) ordered a new election in a county in Georgia where there was devastating proof of segregated voting and actual intimidation of Negro voters, aptly described as "gross, spectacular, completely indefensible * * * racial discrimination" (376 F. 2d 659, 664). The Court was compelled on these facts to employ the "[d]rastic, if not staggering" remedy (*id.* 662) of directing a new election. To cite such a case is to show its lack of applicability to the facts at bar.

Hamer v. *Campbell* (Pet. p. 26) is a strange case for petitioners to cite. There, as in *Bell,* the issue was outright denial of the vote to Negroes; and the Court of Appeals, in enjoining the election, was careful to distinguish reapportionment cases (358 F. 2d 215, 221):

> "[T]he reapportionment cases deal with dilution of the vote. The case involves a deprivation."

Petitioners insist (Pet. p. 16) they "do not request that the required elective districts be drawn on racial lines * * *." But this in effect is what they seek, in their reliance on population statistics in a prolonged attempt to show dilution of Negro and Puerto Rican votes. Since they criticize both use of the former Municipal Court districts (now employed only to fill vacancies in former Municipal Court judgeships) and of county-wide voting, what they seek is, in effect, the creation of new districts of such size and shape as to guarantee a number of Negro and Puerto Rican judges of the Civil Court in exact proportion to their percentage of the population. This amounts to a total distortion of the "one-man-one-vote"

concept and an unwarranted extention of that doctrine to the judiciary.

The claimed "dilution" of Negro and Puerto Rican voting rights (Pet. p. 21) is non-existent. Every voter is treated identically. The Legislature determined that counties were an appropriate district for the election of the 25 new judges here involved and that decision contained no such patent infirmity as to overturn the strong presumption of its constitutionality. The election of judges to replace former Municipal Court justices by the voters of the former Municipal Court districts was likewise a valid legislative determination and petitioners' repeated invocation of words such as "racial discrimination" and alleged "debasement" of voters' rights cannot create a serious constitutional issue where none exists.

Reliance for the first time here on *Jones* v. *Alfred H. Mayer & Co.* (Pet. p. 22) is far-fetched. That case simply had nothing to do with distribution of judicial positions, and to speak of "badges and customs of slavery" here is to spice a stew which contains no meat.

C.

Finally, the attempt to breathe a federal question into the claimed deprivation of a primary election (Pet. pp. 17-18, 25-26) is fatuous. That was framed by petitioners themselves as a pure issue of state law. Nowhere in their complaint or papers in the state courts did they rely on any federal provision, nor would any apply.

Moreover, this contention was properly rejected by the state courts as insubstantial. The New York Election Law provides that where, as here, a vacancy in elective office occurs less than five weeks before any scheduled primary election, candidates are nominated by the county committees of the various parties. Election Law § 131(7). The primary date was June 18, 1968, and the statute by its terms took effect June 1st. Thus, the provisions of § 131(7)

came into play. The law does not limit candidates to those nominated by the parties, but specifically provides for independent nominations. Election Law § 314(11, 18).

The state courts properly found no constitutional or other infirmity in this statutory scheme, part of New York law for decades. Petitioners' claim of some inherent right to a primary under the Constitution is without substance. They point to no specific provision or case requiring a primary in every situation, nor is there any. See *Exon* v. *Tiemann*, 279 F. Supp. 609, 613 (D. C. Neb. 1968) ("it is not necessary to the validity of an election that a candidate for Representative be nominated in a Primary."). What the Constitution does require is that every enrolled voter be permitted to participate equally in whatever methods are established by law for the nomination of candidates. *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944). There is absolutely no showing that that right was abridged here.

Although petitioners toss off the remark that New York law permits a primary "in the spring or fall or on both occasions" (Pet. p. 18, fn.), they cite no authority for this statement and there is none. Election Law § 314(5), applicable in 1968, expressly states:

> "The primary election shall be held on the eighteenth day of June before the general election."

See also Election Law § 191(1)(a) (as amended by L. 1965, ch. 1070), which repealed the earlier provisions for a fall primary, and fixed the date of the primary on the third Tuesday of each June.

Petitioners' reference to the State Constitution as requiring a primary (Pet. p. 17) is inaccurate and in any event of no assistance to them here. The state courts' holding (6a) that the state constitutional provisions were not violated is binding here. *American Fed. of Labor* v. *Watson*, 327 U. S. 582 (1946); *Norman M. Morris Corp.* v. *Hess Bros.*, 243 F. 2d 274 (3rd Cir. 1957).

Finally, *Williams* v. *Rhodes* (Pet. p. 25) is not helpful to petitioners. There was no discrimination here as between different political parties. The right to file independent nominations was explicitly provided for. The relief here sought—aptly characterized in *Bell* v. *Southwell* as "[d]rastic, if not staggering"—is utterly unwarranted by any claim in the petition. Nor do petitioners' frequent, and totally unsubstantiated, stage-whispers of "deals" by "party leaders" add anything of merit to their claims.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, February 24, 1969.

Respectfully submitted,

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Respondent pro se

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(69519) SUPREME COURT, U. S.

FILED

FEB 28 1969

DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1004

MARGARET COX, HOWARD R. MOODY, ALEX J. ROSENBERG, HUMBERTO APONTE, PAUL KERRIGAN, ANDREW COOPER, STANLEY HARRY HAMILTON, PETER WEISS and BEATRICE JONES, individually and on behalf of all other citizen-electors of the City of New York,

Petitioners,

—against—

HERMAN KATZ, City Clerk of the City of New York and JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and J. J. DUBERSTEIN, Commissioners of Election, constituting the Board of Elections in the City of New York,

Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI

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IN THE

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Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI

Petitioners seek a judgment declaring that Chapters 987 and 152 §4 of the New York Laws of 1968 are unconstitutional upon various grounds. Chapter 987, which became

law on June 22, 1968, provides, in part, for the creation of twenty-five additional judges in the Civil Court of the City of New York; apportions the positions among the five counties within the City and further provides for the election of the candidates for such positions by the electors of the respective counties of such City (§14). It is explicitly provided that the Act shall take effect on June 1, 1968; that the additional Civil Court judges provided for therein shall be elected at the general election held in the month of November, 1968 and that they shall take office on January 1, 1969.

Chapter 152 §4 provides that vacancies occurring in the office of judge of the Civil Court at the end of 1968 shall be filled by judges "chosen by the electors of the county or district from which the judge whose term expires * * *, or his predecessor was elected or appointed."

The sole relief sought against the respondents, the City Clerk and Board of Elections of the City of New York is that temporary and permanent injunctions issue enjoining the City Clerk "from certifying to the Board of Elections * * * that 25 offices of additional judges of the Civil Court * * * are to be filled in the general election to be held in November, 1968" and that the Board of Elections be enjoined "from accepting, filing or acting upon any such certification or any certificates of party nomination or independent nominating petitions for such purported public offices * * * and from placing the names of the candidates therefor on the official ballot to be used at the general election in 1968." (Complaint, pp. 40-41).

Decisions in Courts Below

The Court of Appeals of the State of New York unanimously affirmed (22 N Y 2d 903, October 8, 1968), an order of the Appellate Division of the Supreme Court in the First Judicial Department (30 A D 2d 432, September 19, 1968), which, in turn, unanimously affirmed an order of the Supreme Court, New York County, entered August 29, 1968, which denied an application by petitioners for a temporary injunction and dismissed the complaint.

ARGUMENT

While it appears that there is no substantial federal question presented, the duties of respondents in the preparation of ballots are purely ministerial under New York Election Law.

(1)

The duties of the respondents, City Clerk and Board of Elections are clearly defined by statute with respect to the preparation of ballots for public offices to be filled by the electors within the City of New York. New York Election Law §§67 and 103. Such duties are purely ministerial in nature.

The specific duties of the respondent City Clerk are prescribed by Election Law §67 which provides, in part:

> "The secretary of state shall, at least three months before each general election make and transmit to the board of elections of each county, and of the city of New York, a certificate stating each officer, except county, city, village and town officers, and including

senators and members of assembly who lawfully may be voted for at such election by the voters of the county or of such city, or any part thereof. Each county, *city,* village and town *clerk shall within the same time make and transmit to the board of elections a certificate stating each* county, *city,* village or town officer, respectively, not including senators or members of assembly, to be voted for at such election. If any such officer is to be elected to fill a vacancy, the certificate shall so state. * * * " (Emphasis supplied.)

The duties of respondent Board of Elections with respect to the conduct of elections for public office in the City of New York are mandated by the Election Law. Section 103 thereof, provides in part:

"§103 Placing names upon ballot

If * * * certificates of designation or nomination are in compliance with this chapter, the names of the candidates thereby designated or nominated *shall* be printed upon the appropriate official ballot; * * *." (Emphasis supplied.)

(2)

Upon the effective date of Chapter 987 of the Laws of 1968, in June, 1968, twenty-five vacancies immediately existed for the office of judge in the Civil Court of the City of New York in accordance with the provisions of New York Public Officers Law §30, subd. 2, which provides:

"2. When a new or an additional office shall be created, such office shall for the purposes of an appointment or election be vacant from the date of its

creation, until it shall be filled by election or appointment."

Thereafter, it became incumbent upon respondents, City Clerk and Board of Elections to perform their respective ministerial duties as prescribed by the Election Law, *supra.*

(3)

The Attorney General of the State of New York intervened in this action pursuant to New York Executive Law §71 for the purpose of upholding the constitutionality of the challenged Laws of 1968.

While, as pointed out, the functions of the respondents are purely ministerial, they join with the Attorney General in his arguments which demonstrate the obvious constitutionality of the challenged statutes.

CONCLUSION

The application for a writ of certiorari should be denied.

February 26, 1969.

Respectfully submitted,

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Corporation Counsel of
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Attorney for Respondents.

Robert E. Hugh,
of Counsel.